Virgin Records America, Inc v. Thomas Doc. 272

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS, INC., *et al.*,

Plaintiffs,

vs.

JAMMIE THOMAS,

Defendant.

Case No.: 06cv1497-MJD/RLE

**PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF DEFENDANT'S EXPERT DR. YONGDAE KIM[1]**

## INTRODUCTION

Defendant offers Dr. Yongdae Kim as an expert in computer science and engineering who, if allowed to testify, would offer fourteen "possible explanations" as to how someone other than Defendant might be responsible for the infringement of Plaintiffs' copyrights in this case. These opinions and explanations, however, according to Dr. Kim's own deposition testimony, lack any factual or scientific basis. Dr. Kim's testimony is the epitome of what must be excluded under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 403.

This is not a situation where the jury should be permitted to consider the strength of the evidence; rather, this is an example of testimony that MUST be excluded under applicable law. Among the serious defects in Dr. Kim's testimony, rendering it inadmissible, are the following:

- Dr. Kim acknowledges that there is no evidence in this case to support a single one of his fourteen possible explanations.

[1] On May 8, 2009, in accordance with the Court's local rules, Plaintiffs contacted the Court to request a hearing date for this motion to exclude Dr. Kim's testimony. In response to Plaintiffs' request, the Court instructed Plaintiffs, instead, to file the motion *in limine*.

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- Every one of Dr. Kim's possible explanations relies on purely speculative assumptions.
- In presenting his fourteen possible explanations, Dr. Kim ignores and misstates material facts, many of which Dr. Kim acknowledges would preclude some of his suggested possibilities.
- Dr. Kim has no expertise, experience, or training specific to the KaZaA file sharing program or the FastTrack file sharing network, the only peer-to-peer network at issue in this case.
- Dr. Kim does not offer a single probability, only ***theoretical possibilities*** for which there is ***no evidence***.

In short, Defendant cannot point to a single one of Dr. Kim's possible explanations that is supported the facts of this case or any reasonable scientific inquiry. Dr. Kim manages to avoid responsibility for addressing the facts of this case by virtue of having only "skimmed" the deposition and trial transcripts. He admits that he did not read them thoroughly. (Kim Dep. 20:2 to 21:8; 32:14 to 32:25, attached as Exhibit A.) For these and other reasons explained more fully below, the Court should enter an order excluding the testimony and opinions of Dr. Kim from the trial of this matter.

## ARGUMENT

### I. Dr. Kim's Testimony Is Neither Relevant Nor Reliable Under Rule 702 Because It Relies On Speculative Assumptions For Which There Is No Evidence, It Ignores Or Misstates Facts, And It Is Based On Possibilities Only And Not Probabilities.

The Supreme Court has set an unequivocal bar that expert testimony must be excluded absent strict intellectual rigor. The issue is not whether the proffered expert has sufficient credentials; rather, "[t]he trial court [must] decide whether [the] particular expert [has] sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999) (quotation omitted). The trial court must act as the gatekeeper for all types of expert testimony. *Kumho Tire*, 526 U.S. at 141. All proffered expert testimony is governed by the Federal Rule of Evidence 702 reliability requirements. *Id.* at 149.

"District courts must ensure that all scientific testimony ***is both reliable and relevant.***" *Marmo v. Tyson Fresh Meats*, 457 F.3d 748, 758 (8th Cir. 2006) (emphasis added) (citing *Daubert*, 509 U.S. at 580). To demonstrate the reliability requirement, the proponent must show both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically valid. *Id.* (citing *Daubert*, 509 U.S. at 589-90). To demonstrate the relevance requirement, the proponent must show that the reasoning or methodology is applied to the facts at issue in the case. *Id.* (citing *Daubert*, 509 U.S. at 591-93).

"Expert testimony that is speculative is not competent proof and contributes nothing to a legally sufficient evidentiary basis." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000) (quotation omitted). In *Concord Boat*, the Eighth Circuit reversed a trial court's order that permitted the plaintiff's expert to testify concerning a certain economic model. *Id.* at 1057. The court held that, because the expert's opinion lacked sufficient factual foundation, the opinion was "mere speculation" and should have been excluded. *Id.*

The Eighth Circuit's *Concord Boat* decision makes it clear that it is reversible error to admit testimony which is not sufficiently tied to the facts of the case and will not "aid the jury" in its deliberations. *See id.* at 1055 (quoting *Daubert*, 509 U.S. at 591); *see also J.B. Hunt Transp., Inc. v. GMC*, 243 F.3d 441, 444 (8th Cir. 2001) (affirming exclusion of testimony from accident reconstructionist on grounds that the offered testimony lacked factual support and, thus, was not "scientifically valid"); *Marmo*, 457 F.3d at 757 ("Expert testimony is inadmissible if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case."); *Goebel v. Denver & Rio Grande Western R.R.*, 215 F.3d 1083, 1088 (10th Cir. 2000) ("It is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate.") (citing *DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998)); Fed. R. Evid. 702 advisory committee's note (2000) ("The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted."); *Daubert*, 509 U.S. at 589-90 (scientific knowledge "connotes more than subjective belief or unsupported speculation").

Moreover, "[i]t is central to the concept of expert testimony that such testimony is only admissible if it speaks in terms of probabilities instead of possibilities." *Thomas v. Fag Bearings Corp.*, 846 F. Supp. 1382, 1394 (W.D. Mo. Feb. 10, 1994) (refusing to allow expert testimony where "opinions are concocted of impermissible bootstrapping of speculation upon conjecture"); *see also Warren v. Tastove*, 240 Fed. Appx. 771, 773 (10th Cir. 2007) (refusing to allow expert testimony based on possibilities and holding that "a hunch, even an educated hunch, is not enough" for admissibility); *Hall v. Eklof Marine Corp.*, 339 F. Supp. 2d 369, 380 (D.R.I. Oct. 13, 2004) (expert testimony must speak in terms of "probabilities" rather than "possibilities").

### A. Dr. Kim's testimony rests on speculative assumptions for which there is no evidence, and ignores and misstates facts in the record.

Dr. Kim was not asked to give and, if allowed, would not offer any opinion as to whether Defendant infringed Plaintiffs' copyrights or whether Defendant's computer was used to distribute Plaintiffs' copyrighted sound recordings. (Kim Dep. 18:22 to 19:9.) Rather, Dr. Kim was asked to provide, and, if allowed to testify, would offer only "possible explanations" as to how someone other than Defendant could have committed the file sharing at issue in this case.

(Kim Dep. 15:14 to 15:25; *see also* Kim Report at 1, § 2, attached hereto as Exhibit B, entitled "Alternative explanations for evidence presented at trial," and at 11, § 7, stating that Dr. Kim was asked to provide "alternative explanations of [the] evidence" presented by Plaintiffs.) Dr. Kim's report contains a complete list of all of his "possible explanations." (Kim Dep. 17:19 to 17:23.) Dr. Kim admits, however, that there is ***no evidence*** to support any of the fourteen "possible explanations" in his report as to why Defendant may not have engaged in the file-sharing at issue in this case. He further admits that his assumptions underlying these possibilities are purely speculative.

1. In attacking Plaintiffs' identification of Defendant as the infringer in this case, Dr. Kim opines in section 2.3 of his Report that, on the Internet, "no method of identification is foolproof." (Report at 2, § 2.3.) To support this assertion, Dr. Kim references possible issues with "browser 'cookies', SSL certificates, custom image tagging, Flash- and JavaScript based log in systems," and "phishing" attacks. (*Id.*) Dr. Kim concedes, however, that he has no information that the KaZaA program uses any of these features (which it does not), and he acknowledges that there is no evidence of any "phishing" attack in this case. (Kim Dep. 13:8 to 14:17, 99:20 to 100:9.)

Dr. Kim's examples in section 2.3 of his report also all assume the existence of someone with malicious intent who is out to deceive others on the Internet. Dr. Kim admits, however, that there is no evidence in this case of anyone acting with malicious intent. (Kim Dep. 14:4 to 14:12, 100:18 to 101:8.)

2. In section 2.4 of his report, Dr. Kim opines that a "miscreant wishing to cover his or her tracks on the Internet has many options" and states that "[i]t is possible that a remote attacker, exploiting a Windows or other software vulnerability to obtain access, would use

someone else's computer to download or store music." (Report at 3-4, § 2.4.) Dr. Kim, however, admits that this is only a theoretical "possibility," that there is no evidence in this case to support the existence of any miscreant, any infiltration of Defendant's computer, or any remote attack. (Kim Dep. 101:9 to 101:22, 103:4 to 103:19.) He further admits that he is not aware of a single case where KaZaA has been shown to be vulnerable to any such remote attack; rather, this is just a "theoretical possibility":

> Q: Are you familiar with any case out there where KaZaA has been shown to be vulnerable to such a remote attack? Where somebody's computer could be used to, because of a remote attack like that, to distribute files on KaZaA?
> A: I don't know any case.
> Q: Okay. So ***it is a theoretical possibility***?
> A: Yes.

(Kim Dep. 104:15 to 104:19, emphasis added.)

3. In section 2.5 of this Report, Dr. Kim opines regarding the possibility that someone might have spoofed or hijacked Defendant's Internet account. (Report at 4-6, § 2.5.) He first suggests the possibility that, if Defendant had an "unprotected wireless access point," then a neighbor or passerby could gain access to her Internet account. (*Id.*) He admits, however, that there is no evidence in this case that Defendant had a wireless router or that anyone accessed any wireless router in Defendant's house; it's "just possible." (Kim Dep. 105:4 to 105:19.) Dr. Kim not only has no evidence to support this possibility, he also ignores evidence in the record that there was no wireless router in this case. (Trial Tr. 284:11 to 284:13, Doc. No. 221, relevant excerpts attached hereto as Exhibit C.)

4. Dr. Kim next suggests the possibility of "MAC" address "spoofing." (Report at 4, § 2.5.) A MAC ("Media Access Control") address is a unique numerical address assigned to a device plugged in to the Internet, such as a cable modem. (Kim Dep. 106:11 to 107:4; Trial Tr. 287:17 to 287:23, Doc. No. 221.) According to Dr. Kim, the possibility of MAC address

spoofing would require, at a minimum, the following assumptions in this case: (1) the existence of a malicious attacker that wanted to put blame on Defendant; (2) this malicious attacker would have to know the specific numerical MAC address assigned to Defendant's cable modem; (3) this malicious attacker would have to know Defendant's online username, "tereastarr"; (4) this malicious attacker would have to have sufficient computer knowledge to know how to change the modem MAC address on his or her cable modem to match Defendant's cable modem MAC address so that he or she could appear to be Defendant on the Internet; and (5) that Defendant's computer was not turned on at the time because two modems with the same MAC address would cause problems with the network. (Kim Dep. 107:10 to 109:8.) Dr. Kim admits that there is no evidence of any of this in this case—no evidence of any malicious user, no evidence that anyone knew Defendant's numerical modem MAC address aside from Charter, and no "evidence at all of MAC address spoofing in this case." (Kim Dep. 109:9 to 109:20).

Moreover, Dr. Kim admits that MAC address spoofing is unlikely to have occurred when the target computer is on. (Kim Dep. 109:4 to 109:17; *see also* Report at 5, § 2.5, stating that "[i]t is more likely for [spoofing] to happen when Ms. Thomas' computer is off.") Thus, in offering his MAC address spoofing theory, Dr. Kim ignores Defendant's testimony that her computer "was on all the time." (Thomas Dep. 98:3 to 98:5, relevant excerpt attached hereto as Exhibit D.)

5. Dr. Kim next suggests the possibility and gives "historical examples" of so-called "BGP" (Border Gateway Protocol) spoofing, where a miscreant might try to steal entire IP address segments on the Internet. (Report at 5, § 2.5.)[2] His report discusses how "entire IP segments can be stolen outright" and that a malicious attacker can hijack "black" IP space,

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[2] BGP spoofing involves Internet-wide hijacking and has occurred only in very limited instances, none of which are evident in this case.

unused space, and used space. (*Id.*) Dr. Kim admits, however, there is no evidence of any type of BGP spoofing in this case and that the "historic examples" he gives in his Report have no relation to the facts of this case at all. (Kim Dep. 110:12 to 111:16.) Moreover, Dr. Kim himself concedes that this case did not involve any "black IP space," any "temporarily unused" IP space, or any malicious "hijacking of used space." (Kim Dep. 110:21 to 111:9.)

6. Dr. Kim's Report also discusses the possibility of "prefix hijacking," where a malicious attacker announces that a block of IP addresses belongs to it when, in fact, the block belongs to someone else. According to Dr. Kim, "[a]n attacker wishing to appear as coming from a given IP address can announce a route to that address that is more specific than other routes." (Report at 5, § 2.5.) Dr. Kim again, however, concedes that this prefix hijacking theory is just a "possibility, . . . not a probability" and that there is no evidence of any "prefix highjacking" in this case. (Kim Dep. 111:17 to 112:2.)

7. In section 2.6 of his Report, Dr. Kim suggests the possibility of what he calls "malicious super node" framing, where a super node on KaZaA would have the ability "to frame any of its child nodes," thus allowing a super node to manipulate a user's search to direct the user to a confederate disguised as a child node. (Report at 6, § 2.6.)[3] As an initial matter, Dr. Kim has offered no evidence that malicious super node framing has ever been done or even could be done on KaZaA. Beyond that, Dr. Kim's "malicious super node" theory adds another layer of assumptions to Dr. Kim's MAC address spoofing theory discussed above. (Kim Dep. 114:13 to 114:21.) This variation of the MAC address spoofing would require all the assumptions of MAC address spoofing listed above, plus the additional assumptions of (1) a

[3] The "child node' that Dr. Kim refers to is either the computer whose *user is seeking to download* files from the network or the computer whose *user is distributing files* on the network, whereas the "super node" is the computer that acts as an index server on the network assisting users who are searching for files for download. (Kim Dep. 70:8 to 70:20.)

malicious attacker operating at the super node level on the network; and (2) that attacker would need either a second computer or a co-conspirator with a computer so he/she could direct searches to that second computer or co-conspirator who, in turn, would "pretend" to be someone else offering songs for download. (Kim Dep. at 114:19 to 115:4; Report at 6, § 2.6.) Of course, Dr. Kim concedes there is no evidence in this case of any malicious super node or any co-conspirator, let alone any evidence of MAC address spoofing. (Kim Dep. 114:13 to 115:8.) Indeed, Dr. Kim admits that there is no evidence of any malicious framing at all in this case. (Kim Dep. 116:22 to 117:2.)

8. In section 3.3 of his Report, Dr. Kim opines that the "statement that IP address assignments must be unique throughout the Internet is simply false." (Report at 8, § 3.3.) Dr. Kim admits, however, that the Internet is designed such that each device that connects to the Internet is supposed to have a unique IP address so that people can communicate efficiently and effectively. (Kim Dep. 124:18 to 124:23.) His opinion in this section of his Report is based on the possibility that there might be "malicious" activity or "highjacking" of IP addresses. (Report at 8, § 3.3; Kim Dep. 122:6 to 125:19.) But Dr. Kim concedes there is no evidence in this case of any malicious activity, hijacking, or any of the examples he gives in this section. (Kim Dep. 110:21 to 111:9, 111:17 to 112:2, 116:22 to 117:2, 124:24 to 125:19.)

9. Dr. Kim also opines in section 3.3 of his report that there is "no evidence" that the music files on Defendant's hard drive were downloaded from other users on the Internet. (Report at 8, § 3.3.) Dr. Kim—who has no background or experience in forensic examinations—bases this opinion entirely on the forensic copy of Defendant's hard drive, and not on the evidence provided by MediaSentry. (Kim Dep. 126:2 to 127:5.) Dr. Kim, however, either is not aware of, or has intentionally ignored, the fact that the forensic copy of the hard drive that he

looked at is not the same hard drive that Defendant had on February 21, 2005, when MediaSentry detected the infringement in this case and gathered information concerning the downloading and distribution of Plaintiffs' sound recordings. Rather, the hard drive Dr. Kim looked at was not used by Defendant until March 2005, one month later. (Trial Tr. 396:10 to 398:25, Doc. No. 221.) Thus, in arriving at his opinion on downloading, Dr. Kim ignores the material evidence of downloading gathered by MediaSentry in favor of evidence that has nothing to do with the files that were on Defendant's computer in February 2005.

10. In section 3.4 of his Report, Dr. Kim claims that there is no evidence the music files were "consciously placed" in the shared directory on Defendant's computer or willfully offered for distribution. (Report at 9, § 3.4.) As a threshold matter, Dr. Kim's opinion on this issue lacks any scientific basis and is not a scientific conclusion at all. Dr. Kim, furthermore, admits that he is not an expert in human behavior and concedes that his opinion here is based on nothing but "speculation." (Kim Dep. 127:8 to 128:15.)

11. In attacking MediaSentry's evidence in section 4.1 of his report, Dr. Kim relies on documents that were prepared by attorneys in other cases that he found online through the anti-recording industry website—recordingindustryvspeople.blogspot.com—an unsubstantiated blog that frequently contains massive inaccuracies consistent with its anti-recording industry slant. (Kim Dep. 26:8 to 27:17.) Dr Kim himself concedes that it is not standard practice in his field to rely on documents prepared by attorneys to formulate opinions. (Kim Dep. 27:14 to 27:17.)

12. In section 4.2 of his Report, Dr. Kim suggests the possibility that someone at MediaSentry could have "manufactured" evidence of Defendant's IP address. (Report at 9, § 4.2.) This theory, of course, assumes not only the existence of a malicious attacker at MediaSentry, but also someone at MediaSentry with knowledge of Defendant's IP address and

online username, "tereastarr." Dr. Kim admits that there is no evidence at all to suggest that anyone at MediaSentry had such knowledge or manufactured any evidence. (Kim Dep. 131:24 to 132:20.)

Moreover, in criticizing MediaSentry in section 4.2 of his Report, Dr. Kim complains that, "[o]f the 6 documents provided by MediaSentry (logs and screenshots), 4 do not record the date they were collected." (Report at 9, § 4.2.) Here, Dr. Kim both misstates the evidence and ignores facts in the record. First, Dr. Kim is simply wrong. Of the six MediaSentry documents, four record the date and time they were collected and only two do not, the screen shots and the trace route. (Kim Dep. 133:3 to 134:14.) Second, Dr. Kim ignores testimony from MediaSentry that the screen shots and the trace route were generated contemporaneously with the capture of information from Defendant's computer on the night of February 21, 2005. (Trial Tr. at 158:4 to 158:10, 189:5 to 189:8, 190:8 to 190:11, Doc. No. 220.) This is significant because Dr. Kim's inaccurate complaint regarding the lack of time stamps forms the basis for some of the "possible" explanations he would offer in this case. Indeed, Dr. Kim concedes that a trace route taken at the time of capture would eliminate the possibility of "prefix hijacking" because the trace route would show the path to the attacker, "rather than the victim of spoofing." (Report at 6, § 2.5.) It is inexcusable for Dr. Kim to ignore this evidence.

13. In section 4.3 of his Report, Dr. Kim discusses alleged reports of false copyright infringement notices from MediaSentry in other instances. (Report at 9-10, § 4.3.) Dr. Kim admits, however, that he has no specific knowledge of the facts underlying these reports and no information whether the reports he refers to have anything to do with KaZaA or with MediaSentry's work for the record companies. (Kim Dep. 94:5 to 95:16; 128:20 to 130:8; 140:21 to 141:8.) Even more significant, Dr. Kim has no evidence that MediaSentry made a

mistake in this case. (Kim Dep. 95:17 to 95:21.) Nor is he offering any opinion that MediaSentry's identification of the specific IP address in this case is inaccurate. (Kim Dep. 81:24 to 82:2.)

14. Finally, in section 4.4, Dr. Kim offers an opinion that "[t]he KaZaA-reported IP address is not evidence that the machine running KaZaA is not behind a NAT device."[4] Dr. Kim admits, however, that he, in fact, ***has no knowledge to support this opinion***. (Kim Dep. 141:20 to 143:11.) Moreover, while Dr. Kim states in his report that he "could not get access to a functioning version [of KaZaA] to observe its behavior" (Report at 10, § 4.4), he admits that he did, in fact, obtain a functioning version of the program and could have run it to observe its behavior, but did not. (Kim Dep. 144:5 to 145:10.) Thus, Dr. Kim not only states an opinion for which he has no basis (and which is wrong), he admits that he could have tried to observe this behavior on a functioning version of KaZaA, but did not bother to do so.

In short, every one of Dr. Kim's proposed "possible explanations" relies on nothing more than Dr. Kim's speculation as to what might possibly have happened. Not one of Dr. Kim's theories as to how this infringement might possibly have been committed by someone other than Defendant is supported by a single fact in this case. Indeed, many of Dr. Kim's suggested possibilities have nothing whatsoever to do with the circumstances of this case and many are flatly contradicted by the evidence that Dr. Kim has either ignored or misstated. Dr. Kim's testimony, therefore, is based on speculation, is not helpful to the jury, is not reliable, and should not be allowed. *See Daubert*, 509 U.S. at 589-90 (scientific knowledge "connotes more than subjective belief or unsupported speculation"); *Marmo*, 457 F.3d at 758 ("speculative" expert testimony is inadmissible); *Concord Boat*, 207 F.3d at 1057 ("speculative" expert testimony is not permitted).

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[4] A NAT device is a Network Address Translation device.

### B. Dr. Kim's testimony is based entirely on possibilities rather than probabilities.

For each of his theoretical possibilities, Dr. Kim does "not suggest [] that any of them happened in this case or that it is probable, . . . just that it is possible." (Kim Dep. 168:22 to 169:1.) Because Dr. Kim's report offers only possibilities instead of probabilities, his testimony is not reliable and, thus, not admissible. *See Thomas*, 846 F. Supp. at 1394 (opinions based on "probabilities instead of possibilities" are central to the admissibility of expert testimony); *Warren*, 240 Fed. Appx. at 773 (rejecting expert testimony based on possibilities alone); *Hall*, 339 F. Supp. 2d at 380 (expert testimony must speak in terms of 'probabilities' rather than 'possibilities').

## II. Dr. Kim's Testimony Should Also Be Excluded Because Dr. Kim Has No Expertise Specific To The KaZaA File Sharing Program Or The FastTrack File Sharing Network.

Under *Daubert*, the trial court must "decide whether this particular expert [has] sufficient specialized knowledge to assist the jurors in deciding the particular issues in [this] case." *Kuhmo Tire*, 526 U.S. at 156. The court must determine whether a proposed witness possesses the requisite and appropriate background based on training, experience, and research to be sufficiently related to the issues and evidence before the trier of fact. *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994); *Thomas J. Kline, Inc., v. Lorillard, Inc.*, 878 F.2d 791, 799-800 (4th Cir. 1989) (abuse of discretion to permit witness with M.B.A., but with no training or experience in antitrust or making credit decisions, to give expert opinion regarding credit practices).

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Trial courts must exclude the testimony if qualifications specific to the case are lacking. *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 724 (7th Cir. 1999) (reversible error for district court to allow a metallurgy professor who was head of Department of Material Science and Engineering at MIT to testify on toxicology or health affects of manganese because "these conclusions were rooted in medical knowledge and training which [expert witness] did not have"); *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 969-970 (10th Cir. 2001) (board-certified orthopedic surgeon was not qualified to testify about intramedullary nailing since she was not familiar with that surgical technique); *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224, 227 (5th Cir. 2007) (polymer scientist who had never been employed in any capacity dealing with tire design or manufacture, and who had never published any articles about tires or examined a tire professionally before the litigation, was not qualified to testify as tire expert in products liability action).

Here, while Dr. Kim's qualifications in computer science and engineering are not in question, Dr. Kim has no experience at all with the KaZaA file sharing program or the FastTrack file sharing network. He has done no academic research or prepared any reports on the KaZaA program or the FastTrack file sharing protocol. (Kim Dep. 52:18 to 53:8.) He also has no experience with KaZaA Lite, a reverse engineered version of KaZaA with no spyware. (Kim Dep. 58:6 to 58:7.) His experience with KaZaA is limited to his effort to download the program and look at the interface in connection with this case. (Kim Dep. 57:25 to 58:3.) Dr. Kim made no effort to run the program or observe its behavior. (Kim Dep. 144:5 to 145:10.) When asked what he learned from looking at the KaZaA interface, he responded, "Not much." (Kim Dep. 54:6 to 55:5.)

Dr. Kim's lack of expertise regarding KaZaA and the FastTrack network is significant. This case is about Defendant's use of the KaZaA file sharing program to download and distribute Plaintiffs' copyrighted works, and Plaintiffs' identification of Defendant by, among other things, her IP address. When Dr. Kim opines on what IP addresses might report when two computers share files using KaZaA, he is admittedly offering testimony on a topic about which he has no knowledge. (Kim Dep. 73:9 to 74:5, 75:18 to 75:22, 78:10 to 78:18.)

As for Dr. Kim's look at the forensic copy of Defendant's computer, Dr. Kim has no computer forensic experience, no law enforcement experience, no experience with computer forensic tools, is not certified in computer forensics, and has never performed a computer forensic exam. (Kim Dep. 57:5 to 57:21.)

Because Dr. Kim has no experience at all with KaZaA or the FastTrack network, and no computer forensic experience, he should not be allowed to offer testimony on these issues.

## III. Dr. Kim's Testimony Should Be Excluded Under Rule 403 Because Any Relevance Is Substantially Outweighed By The Danger of Unfair Prejudice.

Rule 403 provides for the exclusion of testimony when its relevance is substantially outweighed by its potential prejudice:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .

Fed. R. Evid. 403. The Rule 403 balancing process is especially important in the context of expert testimony. "Because 'expert evidence can be both powerful and quite misleading,' a trial court must take special care to weigh the risk of unfair prejudice against the probative value of the evidence under Fed. R. Evid. 403." *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875, 884 (8th Cir. 1998) (citing *Daubert*, 509 U.S. at 595). A Court should exclude expert evidence which is "uncertain and speculative and would confuse rather than enlighten the jury." *United States v. Curnew*, 788 F.2d 1335, 1337 (8th Cir. 1986).

In jury trials, the danger of prejudice resulting from the presentation of expert testimony is significant, because of the potential for the jury to automatically accept an expert witness's testimony. *Jinro America v. Secure Investments, Inc.*, 266 F.3d 993, 1005-07 (9th Cir. 2001) (district court abused its discretion in admitting defense expert's unreliable, inflammatory, ethnically-biased testimony, given likelihood that statements as a purported expert would carry special weight with the jury); *Rogers v. Ford Motor Co.*, 952 F. Supp. 606, 613 (N.D. Ind. 1997) (professional engineer's expert testimony excluded because, while it was relevant and sufficiently reliable to warrant admission into evidence, proponent did not show sufficient reliability to overcome potential for prejudice).

Here, the probative value of Dr. Kim's testimony is virtually nil because Dr. Kim has no experience or training with KaZaA or the FastTrack network and because his opinions rely on speculative assumptions for which there is no evidence. Because Dr. Kim's testimony is neither relevant nor reliable, the dangers of unfair prejudice to Plaintiffs, of confusing of the issues, and of misleading the jury substantially outweigh any probative value and his testimony should be excluded.

## CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court exclude the testimony and opinions of Dr. Kim from the trial of this matter.

Respectfully submitted this 1st day of June 2009.

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